FAO 19/2004
BEFORE
HON'BLE MRS. JUSTICE ANIMA HAZARIKA

JUDGMENT AND ORDER

The instant first appeal has been preferred by the plaintiff-appellant questioning the validity and correctness of the impugned judgment and order dated 19.03.2004 passed by the learned District Judge, Kokrajhar in Title Suit (P) Case No. 4 of 1986 whereby and whereunder the learned District Judge, Kokrajhar dismissed the petition for grant of Letters of Administration of property left by the deceased Smti Samandari Bin filed under Section 278 of the Indian Succession Act, 1925 (for short 'the Act') by the plaintiff holding disentitlement to get the Letters of Administration.

2. The factual matrix from the pleaded facts of the parties are summarised as follows: -
Smti Chameli Bin, one of the daughter of the deceased Smti Samandari Bin had applied for granting of Letters of Administration of the property left by Smti Samandari Bin, who died on 03.09.1984, whereof Smti Samandari Bin had executed a will duly attested on 13.06.1984 which was her last testament. However, the said fact was subsequently amended on 28.01.2002 which shall now be read as will duly attested on 06.02.1984 and a codicil dated 13.06.1984 which was her last testament wherein the testator bequeathed her property mentioned in Schedule 'A' of the petition to the petitioner-plaintiff only. The testator died leaving behind Champa Bin, Manju Bin, her son's wife and their sons and daughters represented by Smti Manju Bin. The amount of assets likely to come to the petitioner is Rs. 50,000/- from which she claims deduction for medical and funeral expenses amounting to Rs.16,000/-. As there was no previous petition filed claiming Letters of Administration and/or there was no rejection order relating to Letters of Administration; therefore, it was prayed that there is no impediment in granting Letters of Administration of the property left by the testator.

3. Upon receipt of summons, the opposite parties appeared and contested by filing written statement to the grant of Letters of Administration to the appellant-plaintiff contending inter alia that the petition is not maintainable because the petition is not supported by affidavit stating the properties left behind and debts due by and to the estate of the deceased, also no attesting witness has been cited in the petition. Moreover the testator Samandari Bin had never executed a will in favour of the appellant as she lived with her son Indol Bin and on his death Smti Manju Bin (wife of late Indol Bin) looked after her till her death whereon she was suffering from epilepsy and completely bedridden after the death of her son on 14.05.1984 and she had never executed any will followed by participation in its registration and hence prayed for dismissal of the proceeding.

4. The next of kin of the testator as defendants have also filed objection against the amendment of the petition contending inter alia that if the amendment is accepted as sought for, it would change the nature and character of the proceeding claiming the document dated 06.02.1984 as will and 13.06.1984 as codicil as it would disclose that there is contradictory statement between the petition filed earlier and the amendment as sought for because the deed dated 06.02.1984 cannot be treated as last will of the testator and hence prayed for d

ismissal of the case.

5. The learned trial court on the pleadings of the parties framed the following issues: -

1. Whether there is cause of action?
2. Whether the will annexed with the petition is the last will of the testator?
3. Whether the testator had the capacity to execute the will and she duly executed the same?
4. Whether the petitioner is entitled to get deductions as mentioned in the petition?
5. Whether the petitioner (plaintiff) is entitled to get the Letters of Administration as prayed for?

6. It may be pertinent to mention that the testator appointed one Lakhan Prasad Shah as an executor in the will dated 06.02.1984 whereby the learned trial court has held that the legatee cannot file the application seeking Letters of Administration against which the petitioner had approached this Court, wherein this Court remanded the case holding that the beneficiary can certainly come up with the application for grant of probate. Thereafter, the case proceeded on remand but the learned trial court rejected the amendment of the petition wherefor the petitioner has approached this Court and this Court vide order dated 18.10.2001 allowed the amendment and accordingly a fresh issue has been framed which is quoted hereunder:-

i. Whether the document dated 13.06.1984 is a codicil or will?

7. The learned trial judge took up the issue No.1 framed after the amendment of the petition allowed by this court. While deciding the issue, the court has noticed that before the amendment of the petition the pleaded facts of the appellant was that the deceased Samandari Bin executed a will duly attested on 13.06.1984 which is described as the last testament of the testator. But in the amended petition, there is a clear departure from the earlier stand whereby it was introduced that the testator executed a will duly attested on 06.02.1984 and a codicil dated 13.06.1984 which is the last testament of the deceased, but in the earlier petition seeking Letters of Administration there is no mention of will dated 06.02.1984. So the facts introduced require evidence to prove that the will dated 06.02.1984 is the last testament and the will dated 13.06.1984 is the correction of the will dated 06.02.1984. But the petitioner failed to explain the contradictory pleadings in the form of an evidence on affidavit allowing herself in the witness box for cross-examination which she failed to remove and consequently thereupon the trial court has no other option but to answer the issue in the negative and against the petitioner.

8. The pleaded facts as it would appear from the record and the amendment petition that the will dated 13.06.1984 cannot be conclusively proved as last testament because the last testament was executed on 06.02.1984 and subsequently some correction was made by executing the document dated 13.06.1984 and in absence of evidence leading to the said facts by the petitioner during the trial, the learned trial court answered the issue No.2 in the negative and against the petitioner.

9. Relating to issue No.3, the petitioner produced and exhibited two documents vide Ext. 1 and Ext. 2 claiming for grant of Letters of Administration of the properties left by the testator Samandari Bin. Ext. I was executed on 06.02.1984 on which date or when her only son Indol Bin was alive whereas Ext. 2 was executed after the death of Indol Bin. As per the title page of citation, it is an admitted fact that the testator was survived by two daughters, one daughter-in-

law and her minor son and daughters, who were living with the testator till her death. However, her other daughter, Smti. Champa Bin, supported the case of the opposite parties/defendants. During the trial, the petitioner produced five (5) witnesses to substantiate her claim for granting Letters of Administration. PW 1 is the doctor, who provided medical treatment to the testator Samandari till her death stated that he treated the testator for her bowel disorder but she was mentally alert who was thoroughly cross-examined. In cross-examination, PW 1 admitted that the testator Samandari Bin was aged about 70/80 years and at her later stage of life she was not in a position to walk or to get up on her own and he used to get his fees from the opposite party Monju Bin and it was she wh om he advised to take necessary step for the patient. The petitioner was examine d as PW 2 who deposed that she received Ext. I a year before the death of her m other, who was healthy till one month before her death and she transferred some money to the account of her mother. PW 3 deposed that he knows the testator sin ce long and in one occasion in the year 1984, he was asked by late Samandari Bin to prepare a will in favour of Smti. Chameli Bin and so he called the Sub-Regis trar and the writer of the deed to her house and the same was executed in her pr esence. In Exts. 1 and 2 there are thumb impressions stated to be of Samandari B in but the thumb impression has not been endorsed by the writer of the deed. Mor eover, PW 3 has deposed that he cannot say which of the document was corrected. PW 4 is the Sub-Registrar who stated that he came to the house of Samandari B in on commission for registering the deed of will vide Ext. 2 and at that time she was bed-ridden and he also stated that the houses of PW 3 and PW 5 were outside the town area and far away from the house of the testator. Moreover, PW 4 also failed to explain why the thumb impression of the testator was not end orsed by the writer of the deed. PW 5 deposed that at the time of execution of t he will, the age of the testator would be about 60 years and she was in good hea lth.

A bare perusal of the evidence on record including the evidence of opposite part ies/defendants it is clear that the will is not above suspicion as it would appe ar that Ext. I dated 06.02.1984 was executed when her only son was alive and onl y son of the testator died two months later and from the recital of Ext. I, it i s clear that the testator made no reference to her only son or explained anythin g for depriving her only son from the said property. In Ext. 2, similarly, there was no mention regarding the wife and children of Indol Bin when it was execute d on 13.06.1984 as correction of the will dated 06.02.1984. Moreover the writer of Ext.I and Ext.2 was not examined and the thumb impression taken on the deeds were not endorsed by the writers of the wills and the alleged thumb impression o f the testator were taken without indicating whether those were left thumb impr ession or right thumb impression wherefor there are several suspicious circumsta nces arose. It is the duty of the propounder to dispel the suspicion of the cour t and to satisfy its conscience that the will relied upon, is a genuine document and it is the last will of the testator, but the petitioner failed to dispel th e suspicion and as a consequence thereof the learned trial court answered the is sue No.3 in the negative and against the petitioner.

10. The issue No. 4 relates to deduction of expenses claimed by the petition er which could not be established by evidence on record in view of the depositio n of PW 1 and opposite party No.2, the other daughter of the testator. Moreover, the pleaded facts established in the case would reveal that Ext. 2 dated 13.06. 1984 is only an amendment of the document (Ext.I) dated 06.02.1984 meaning there by that Ext. 2 dated 13.06.1984 is not the last testament of the testator but it is a codicil of the document dated 06.02.1984 and accordingly answered the is sues in negative and against the petitioner, thus, in view of the findings in is sue Nos.1, 2, 3 and 4, the learned trial court decided the issue No.5 and passe d the impugned judgment and order holding that the petitioner is not entitled to get the Letters of Administration. The impugned judgment and order is under ch allenge before this Court in the instant First Appeal.

11. Heard Mr. GN Sahewalla, learned Senior counsel assisted by Ms. B Goyal, learned counsel appearing for the appellant. Also heard Mr. BC Das, learned Senior counsel assisted by Mr. U Dutta, learned counsel appearing for the respondent.

12. Criticising the judgment and order dated 19.03.2004 passed by the learned trial court in Title Suit (P) No. 4 of 1984, Mr. Sahewalla, learned Senior counsel appearing for the appellant would contend that the evidence on record of PW 1, PW 2, DW 1, DW 2 and DW 3 would amply demonstrate that the approach of the learned trial court in deciding the issues in negative is wrong and perverse to the evidence on record. Learned counsel, therefore, led the court the entire evidence on record to substantiate that Ext. I and Ext. 2 are genuine document and the court has to decide that the will has been executed by the testator and she had the capacity to understand the nature of the act and she was in sound state of mind at the time of making it which the petitioner has proved in the instant case and as such require interference with the judgment and order dated 19.03.2004 passed in T.S. (P) No. 4 of 1986 under the appellate jurisdiction.

13. Mr. Sahewala, learned Senior counsel would further contend that a conjoint reading of section 63 (c) of the Act and Section 68 of the Indian Evidence Act do not envisage that both the witnesses are required to be present together and see each other sign on the instrument and it is also not necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary. What shall be necessary is that the subsequent witness signing should be informed/should know about signing by the first witness and one witness to the instrument is enough to validate the instrument and hence the findings arrived at by the learned trial court is perverse and the same is liable to be interfered with under the appellate jurisdiction.

14. In support of his contentions, the learned Senior counsel has relied upon the following decisions: -

1. (2010) 14 SCC 266,
Gopal Swaroop -vs- Krishna Murari Mangal & Others.

2. (2009) 4 SCC 780,
Yumnam Ongbi Tampha Ibema Devi -vs- Yamnam Joykumar Singh and others.

3. (2007) 9 SCC 728,
Benga Behera and another -vs- Braja Kishore Nanda and others.

4. (2008) 4 SCC 300,
Krishna Kumar Birla -vs- Rajendra Singh Lodha and others.

5. (2005) 11 SCC 189,
Durga -vs- Anil Kumar.

15. Per contra, Mr. Das, learned Senior counsel representing the respondent No. 2 took the court to the evidence on record and would contend that the rule of proof in respect of a codicil would be the same as the rule of proof provides in case of a will, meaning thereby that the mode of proving the will has been laid down by the provisions of section 63 of the Act and section 68 of the Evidence Act which postulates that the document must be signed by two attesting witnesses. In the case in hand, the will and codicil were not proved by the attesting witnesses as required under section 68 of the Evidence Act. Though PW 3, Kasem Ali Sheikh, one of the attesting witnesses of the codicil deposed that after Samandari Bin put her thumb impression, he and Munia Bin signed on the aforesaid paper and further deposed that Munia Bin had seen him signing and he had seen

her putting the signature and Ext 2 was the 'Dalil' and Ext. 2(1) was his signature, whereas PW 5 Prafulla Adhikari one of the witnesses of the will has deposed that after Samandari Bin put her thumb impression, the witnesses Lakhan Prasad Shah and himself put over signatures and though one of the attesting witness to the will and codicil proved his signature but failed to prove the signature of other attesting witness to the will as well as to the codicil meaning thereby that one attesting witness was examined but he failed to prove the attestation of the will by the other witness which falls short of mandatory provisions of section 68 of the Evidence Act. Thus, the judgment and order passed by the learned court below do not require to be interfered with in the facts and circumstances of the case.

16. Mr. Das, learned Senior counsel has referred the following decisions in support of his contentions: -

1. (1977) 1 SCC 368,
(Smti. Jaswant Kaur -vs- Smti. Amrit Kaur & Others)
2. (2003) 2 SCC 91,
(Janki Narayan Bhoir -vs- Narayan Namdeo Kadam)

3. (2003) 12 SCC 35,
(Bharat Ram and Another -vs- Suresh and Others)

4. (2010) 5 SCC 274,
(S.R. Srinivasa and Other -vs- S. Padmavathamma)

17. Considered the argument advanced. Perused the relevant records including the pleaded facts as well as the evidence led by the parties. Admittedly the appellant sought for Letters of Administration of the properties of the testator Samandari Bin. The facts pleaded would reveal that the testator executed a will duly attested on 13.06.1984 which is stated to be the last testament of the deceased whereas a new fact has been introduced by way of amendment, wherein the appellant had pleaded that the testator executed a will duly attested on 06.02.1984 and a codicil dated 13.06.1984 which is the last testament of the deceased but the fact introduced relating to will dated 06.02.1984 as stated to be the last testament of the deceased while the will dated 13.06.1984 is stated to be correction of the will dated 06.02.1984, but there was no mention regarding the will dated 06.02.1984 in the original petition. The appellant failed to bring in evidence the contradiction of the dates of the will which prima facie would go against her as has been held by the learned trial court, more so, when she claimed that the last testament was executed on 06.02.1984, which, however, subsequently corrected by executing the document dated 13.06.1984 but the appellant failed to bring the same facts into evidence and therefore, the finding arrived at by the learned trial court cannot be said to be perverse.

18. From a reading of the evidence adduced, it would reveal that it is the opposite party No. 2 who used to look after the ailing Samandari Bin as has been disclosed by PW 1. The evidence of PW 2 creates a suspicion when she deposed that she received Ext. I a year before the death of the testator and the testator was mentally fit and she transferred some money to the account of her mother (the testator) and she performed all the rituals on her death which fact has been denied by her own sister Champa Bin who deposed that the grandson of the testator has performed the rituals. Moreover, the evidence of DW 3 would create a doubt relating to the will executed by the testator when the properties in Dag No. 266 which was sold out has been included in the properties left out by the testator and it creates a cloud on the mind of the court relating to genuineness of the will and the codicil as has been held by the learned trial court.

19. Section 63 of the Act prescribes the mode/manner of execution of a will which are required to be complied mandatorily. Attestation by two or more witnesses and each of the witnesses must have seen the testator sign or affix his mark to the will. On the other hand, Section 68 of the Evidence Act speaks as to how a document required by law to be attested can be proved. This section provides a document required by law to be attested shall not be used as evidence until one attesting witnesses at least has been called for the purpose of proving its execution. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act it appears that person propounding the will has got to prove that the will was duly executed, i.e. by proving the signature on the will as that of the testator and that attestations were also made properly as required by Clause (c) of Section 63 of the Act. If one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, i.e. attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove that 6there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. In the instant case, the will and codicil were not proved by the attesting witnesses as required under Section 68 of the Evidence Act, wherein PW 3, Kasem Ali Seikh is one of the attesting witness of the codicil and PW 5, Prafulla Kumar Adhikari is one of the attesting witness of the will.

PW 3, Kasem Ali Seikh, in his evidence stated that after Samandari Bin put her thumb impression, he and Munia Bin signed on the aforesaid papers. He further deposed that Munia Bin had seen him signing and he had seen her putting the signature. Ext. 2 was the Dalil and Ext.2(1) was his signature.

PW 5, Prafulla Adhikari in his evidence stated that after Samandari Bin put her thumb impression, the witnesses Lakhan Prasad Shah and himself respectively put over signatures. Ext.3(1) was his signature.

Thus, although one of the attesting witness to the will as well as the codicil proved his signature but failed to prove the signature of the other attesting witness to the will as well as the codicil. Where one attesting witness was examined and he failed to prove the attestation of the will by the other witness, the appellant’s case suffers from the deficiency in meeting the mandatory requirements of Section 63 (c) of the Act and Section 68 of the Evidence Act.

20. The authority referred to and reported in (2010) 14 SCC 266, (Gopal Swaroop) (supra) is distinguishable. In that case, the core issue was whether each of the attesting witnesses to the will had seen the testator signing or affixing his mark on the will or each of the witnesses had signed the will in the presence of the testator which is the requirement of section 63 of the Act which is not the case in hand. Herein it would be appropriate to refer the evidence of PW 3 and PW 5 which has already been referred to which amply demonstrate that Ext. I and Ext. 2 were not proved as required under the law and the decision arrived at by the learned trial court thus do not require to be interfered with. The other two decisions are not applicable as the issues involved in those cases are different from the case in hand.

21. In the result, there is no merit in the first appeal and the same is accordingly dismissed. The parties are left to bear their own costs.

22. In view of the decision arrived at, the case laws cited by the learned counsel appearing for the respondents have not been discussed to avoid burdening

the instant judgment.

23. Send down the lower courts records.